Supreme Court, U.S.
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In the

Supreme Court of the United States

VICTOR RENDEROS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW
(Supreme Court Rule 14.1 (a))

1. Is California Penal Code section 803(g) an unconstitutional ex post facto law within the meaning of Article 1, section 10, clause 1 of the United States Constitution as applied to prosecutions based on allegations of post-1987 molestation, considering this Court's decision in *Stogner v. California*, 539 U.S. 607, 123 S. Ct. 2446, 156 L. Ed. 2d 544, 71 U.S.L.W. 4588 (2003), which held that section 803(g) is an unconstitutional ex post facto law as applied to prosecutions based on allegations of pre-1988 molestation?

LIST OF ALL PARTIES

Petitioner

VICTOR RENDEROS.

Respondents

STATE OF CALIFORNIA.

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PETITION FOR WRIT OF CERTIORARI

Defendant Victor Renderos respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District, Division 3, decided December 30, 2003, and which was denied review by the California Supreme Court on April 14, 2004.

OPINION BELOW (Supreme Court Rule 14.1(d))

The opinion of the California Court of Appeal, First Appellate District, which is the subject of this petition, was reported at *People v. Renderos*, 114 Cal. App. 4th 961; 8 Cal. Rptr. 3d 163 (2003). It appears in Appendix A. The California Supreme Court's order of April 14, 2003, denying discretionary review is attached as Appendix B.

JURISDICTIONAL STATEMENT

The judgment of the California Court of Appeal to be reviewed was filed on December 30, 2003. Appendix. A. The California Supreme Court denied discretionary review on April 14, 2004. Appendix. B. This petition is filed within 90 days of that date. Supreme Court Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Article I, section 10, clause 1, provides: "No State shall ... pass any ... Ex Post Facto Law..."

California Penal Code section 800

Except as provided in Section 799, prosecution for an offense punishable by imprisonment in the state prison for eight years or more shall be commenced within six years after commission of the offense.

California Penal Code section 803(g)

(1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5.

(2) This subdivision applies only if both of the following occur:

(A) The limitation period specified in Section 800 or 801 has expired.

(B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's allegation. No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals.

(3)

(A) This subdivision applies to a cause of action arising before,

on, or after January 1, 1994, the effective date of this subdivision, and it shall revive any cause of action barred by Section 800 or 801 if any of the following occurred or occurs:

(i) The complaint or indictment was filed on or before January 1, 1997, and it was filed within the time period specified in this subdivision.

(ii) The complaint or indictment is or was filed subsequent to January 1, 1997, and it is or was filed within the time period specified within this subdivision.

(iii) The victim made the report required by this subdivision to a law enforcement agency after January 1, 1994, and a complaint or indictment was not filed within the time period specified in this subdivision, but a complaint or indictment is filed no later than 180 days after the date on which either a published opinion of the California Supreme Court, deciding the question of whether retroactive application of this subdivision is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision is constitutional, whichever occurs first.

(iv) The victim made the report required by this subdivision to a law enforcement agency after January 1, 1994, and a complaint or indictment was filed within the time period specified in this subdivision, but the indictment, complaint, or subsequently filed information was dismissed, but a new complaint or indictment is filed no later than 180 days after the date on which either a published opinion of the California Supreme Court, deciding the question of whether retroactive application of

this subdivision is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision is constitutional, whichever occurs first.

(B)

(i) If the victim made the report required by this subdivision to a law enforcement agency after January 1, 1994, and a complaint or indictment was filed within the time period specified in this subdivision, but the indictment, complaint, or subsequently filed information was dismissed, a new complaint or indictment may be filed notwithstanding any other provision of law, including, but not limited to, subdivision (c) of Section 871.5 and subdivision (b) of Section 1238.

(ii) An order dismissing an action filed under this subdivision, which is entered or becomes effective at any time prior to 180 days after the date on which either a published opinion of the California Supreme Court, deciding the question of whether retroactive application of this section is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision is constitutional, whichever occurs first, shall not be considered an order terminating an action within the meaning of Section 1387.

(iii) Any ruling regarding the retroactivity of this subdivision or its constitutionality made in the course of the previous proceeding, by any trial court or any intermediate appellate court, shall not be binding upon refiling.

STATEMENT OF THE CASE

1. Summary of proceedings below

On April 25, 2001, a criminal complaint was filed charging Petitioner with 1 count of California Penal Code section 288.5, based on acts allegedly occurring between May 1, 1992 and September 18, 1992, 2 counts of California Penal Code section 289(j) based on acts allegedly occurring between September 19, 1992 and September 18, 1994, and 23 counts of California Penal Code section 288(a) based on acts allegedly occurring between September 1, 1992 and July 31, 1994. The complaint said nothing about the statute of limitations. (Appendix C). A later amended information, however, relied on the statute of limitations set forth in California Penal Code section 803(g). The Amended Information acknowledged that California Penal Code section 800's six year statute of limitations had expired on July 31, 2000, before the complaint had been filed.

Following trial, the jury convicted petitioner of twenty-six of the twenty-seven sex offense counts. The Court sentenced petitioner to 66 years in prison. Petitioner filed a timely notice of appeal, filed briefs, and also filed a companion habeas corpus petition alleging ineffective assistance of counsel. In the appeal, petitioner relied on this court's opinion in *Stogner v. California*, 539 U.S. 607, 123 S. Ct. 2446, 156 L. Ed. 2d 544, 71 U.S.L.W. 4588 (2003). The California Court of Appeals affirmed petitioner's conviction on December 30, 2003 in a published opinion, holding that *Stogner* did not apply. (Appendix 1). The California Supreme Court denied review on April 14, 2004. (Appendix 2).

2. Evidence at Trial

a. Ryan Carter

The complaining witness, Ryan Carter, testified that petitioner had molested him when Ryan was a child.

Ryan said that his mother Lisa started dating petitioner in May of 1992 when Ryan was "seven or eight" years old. (RT 36,74). Lisa and petitioner dated for four years. (RT 36). Petitioner came to her house each evening for dinner. When Lisa, a realtor, had to go out in the evening to show a property, petitioner would stay with Ryan and his brother Jordan. (RT 41).

Ryan, Jordan, Lisa, and petitioner went to the Russian River when Ryan was about eight years old. Ryan testified that the trip was in the springtime, getting toward the summer. (RT 95 110).[1] On this trip, petitioner took the two boys(RT 76) on a canoe ride. After paddling for awhile, they landed the canoe on a sand bar. Ryan testified that petitioner took Ryan's hand and put it on petitioner's semi-erect penis saying, "leave it there". Ryan said he removed his hand after just a few seconds. (RT 76-78). Driving home, Ryan rode with petitioner in his truck while Jordan and Lisa rode home in her car. Ryan testified that, on the way home, he asked petitioner if petitioner had ever been to jail. Petitioner replied, "Yeah, there are consequences for everything." (RT 79,111). Ryan also testified that, months later, petitioner told Ryan not to tell his mother about the sexual encounter at Russian River. (RT 79-80).

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[1] Lisa, however, testified that May was when she began to date petitioner and that the trip to the Russian River was in the late summer, approximately three months after she began to date petitioner. (RT 42).

Ryan said that the next time something sexual happened between himself and petitioner was two months after the trip to the Russian River.(RT 80, 112). Ryan was in his bedroom. Petitioner came in, fondled Ryan, and had Ryan masturbate him. (RT 81-83). Ryan said that, after the second sexual episode, petitioner would repeat the same conduct whenever Ryan's mother was away working nights. (RT 86).

Ryan testified that petitioner once tried to get Ryan to give him oral sex, but Ryan bit petitioner. (RT 88). About the same time, petitioner stuck his finger into Ryan's rectum. (RT 89). On another occasion, said Ryan, petitioner touched Ryan's rectum while Ryan was masturbating petitioner, but did not put his finger inside. (RT 91-92). Ryan testified that when he was close to eleven years old, petitioner tried to insert his penis into Ryan's rectum. Ryan said he was bleeding for weeks afterward. (RT 93).

Ryan said that the sex between himself and petitioner stopped when Ryan reached eleven.(RT 97-98).

In March of 2001, when Ryan was 17, he told his girlfriend that petitioner had molested him. The girlfriend prompted him to report the alleged abuse to the police. (RT 101).

b. The pretext telephone calls

After the police interviewed him, on May 20, 2001, Ryan made two recorded telephone calls to petitioner from the police department. (RT 102).

In the first tape, Ryan mentioned the incident at Russian River. Petitioner first replied that he didn't remember, and later said: "That was a long time ago, don't worry about it. And you were just playing around, you know? No big thing."

In the second tape, Ryan asked petitioner to "counsel" him because he "can't get hard" during sex with his girlfriend. The following exchange occurred:

Ryan: "...you would always like make me put my hand on your penis and shit like that? I mean–that bothers me."

Petitioner: "Oh well, you know? You–You wanted to do that. You know, remember? You wanted to."

Ryan: "Man, I was eight years old though."

Petitioner: "No, no. Shit no. You were about 12, Man. You were old, already. And you was – I didn't – I didn't meet you when you was eight. You was older than that."

Later Ryan complained: "...it's just not normal for guys to grab each other's dicks."

Petitioner: "Yeah, I couldn't figure out why you wanted to do it. Remember that?"

Ryan: "I didn't really want to, but you got my hand, you know?"

Petitioner:"No, you're the one. You started out, remember, you wanted to experiment crazy things. You were–You were always doing crazy things. Remember that?"

Later in the call petitioner asked Ryan what his girlfriend looked like.

Ryan replied:

"...She looks good, but I mean like, why'd you like–I just don't get that, I mean like how you'd make me try to suck your dick and

everything. I mean—it's like you were using –it's like you were using me to get what you wanted."

Petitioner: "Oh, no, no, no, no, no. Huh-uh. No. No. You got me wrong. You want to experiment things. You want to fuck around with this. You want to do that. You want to do this. You wanted to do that. You're the one that always wanted it. Remember the way you are, man. The way you used to be."

Ryan: "I don't know how I motivated it though, because I was - hella-young, and that's just what's been bothering me."

Petitioner: "Well, you knew what you were doing, bro'."

Ryan later complained:

"I mean it's just–I just think it's not normal for like you know, an older man to grab a kid's hand and put it on his dick."

Petitioner: "Oh, forget about that shit, you want to–you want to do things like that when you were younger, you want to do this, you want to experiment different things."

Ryan: "But then remember, you would grab my dick, too. I mean--"

Petitioner: "You forget abut those things. Just forget about those things and–and like I tell you, concentrate on now. Don't—forget about then. Forget about that shit, Man. Concentrate on your girl, on your woman's pussy."

Later Ryan said:

"But then why'd you grab me, dude?"

Petitioner: "Forget about things like that. You were grabbing me you know and I was, you know, we were just fuckin' around and just forget about that shit."

(Augmentation. Transcript of Recorded Pretext Call, Ryan Carter and Victor Renderos).

c. Petitioner's testimony.

Petitioner had dated Lisa for three or four years. They engaged in normal sexual relations. Petitioner went to her house each evening for dinner but would go home between 10:30 and 11:00 p.m. (RT 152).

Lisa occasionally she went to her office in the evening to do paperwork. (RT 152). She asked him to mind the boys very infrequently. He could count the times on one hand. (RT 152-154).

Petitioner and Lisa would have sex after the boys went to bed. (RT 154). Petitioner occasionally heard the boys giggling at the door.(RT 155). Occasionally, petitioner came out of Lisa's bedroom to find Ryan outside, as if he had been waiting for petitioner. Ryan would say: "Hey, how do you like my mother's...female parts?" or something similar. Then Ryan would grab petitioner's penis. Petitioner said he objected and told Ryan not to do that. But Ryan repeated this conduct about five times. Ryan was eleven or twelve at the time. (RT 155,165-166).

Petitioner denied all of Ryan's accusations of molestation (RT 159-160). Petitioner said that during the pretext phone call, he thought that Ryan was referring to the five or so times when Ryan had waited for him outside Lisa's bedroom and grabbed his penis, and responded accordingly. (RT 161,176).

Trial counsel did not cross-examine either Ryan or his mother on the

issue of financial bias. Ryan's mother owed petitioner money, and both she and Ryan had plans to file a civil action for damages if petitioner was convicted. Ryan and his mother filed a damages action less than a month after petitioner's sentencing hearing. (Exhibit "A" to habeas corpus petition.)

d. Jury instructions

The trial court instructed the jury that if it found petitioner guilty beyond a reasonable doubt of any of the sex counts, it would then have to decide whether the counts were timely under section 803(g). To do so, the jury would have to decide whether there was "independent evidence" that clearly and convincingly corroborated Ryan's claims of molestation. Such evidence could not include the opinion of a mental health professional. The court defined "clear and convincing evidence" as "evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof."

ARGUMENT

1. The Supreme Court should grant certiorari because of the importance of the issues in this case.

This petition involves issues of substantial importance. At issue is the scope of this court's recent decision in *Stogner v. California*, which held that California Penal Code section 803(g) was an unconstitutional ex post facto law as applied to prosecutions based on pre-1988 allegations of molest. *Stogner* did not specifically decide whether section 803(g) is an unconstitutional ex post facto law as applied to prosecutions based on post-1987 allegations of molest.

Because the issues involved go well beyond the particular petitioner's concerns, certiorari is appropriate. The original *Stogner* decision

affected a relatively small number of cases involving accusations predating 1988. The issues here involve many more cases and are potentially far more significant.

2. California Penal Code section 803(g) is an unconstitutional *ex post facto* law even as applied to prosecutions based on allegations of post 1987 molestation.

On June 26, 2003, this Court issued its opinion in *Stogner v. California*. This Court held that a statute that to revive an expired statute of limitations is an unconstitutional ex post facto law within the meaning of Article 1, section 10, clause 1 of the United States Constitution. The Court found Section 803(g)unconstitutional when used to permit prosecutions based on claims of pre-1988 molestation.[2] The Court did not decide if section 803(g) would be unconstitutional if applied to prosecutions based on post-1987 molestations.

The break between 1987 and 1988 is significant. When section 803(g) first became effective on January 1, 1994, the existing statute of limitations for child molestation was six years. The six years would already have expired for pre-1988 claims, but not for post-1987 claims.

The Court recognized that some prior decisions of lower courts had found "extension" statutes constitutional so long as the earlier limitations period had not expired when the new statute went into effect.[3]

However, the Court strongly suggested that section 803(g) is not an

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[2] Stogner's alleged crimes all occurred before 1988.

[3] The Court did not hold that such "extension" statutes were constitutional, however.

"extension" statutes.

The Court held that section 803(g) raised ex post facto issues for two different reasons. The first was that section 803(g) "was enacted after prior limitations periods for Stogner's alleged offenses had expired." *Stogner v. California*, 539 U.S. 607, 123 S.Ct at 2449, 156 L.Ed.2d at 551:

> "First, the new statute threatens the kinds of harm that, in this Court's view, the Ex Post Facto Clause seeks to avoid. Long ago the Court pointed out that the Clause protects liberty by preventing governments from enacting statutes with 'manifestly unjust and oppressive' retroactive effects. *Calder v. Bull*, 3 Dall. 386, 391, 1 L. Ed. 648 (1798). Judge Learned Hand later wrote that extending a limitations period after the State has assured 'a man that he has become safe from its pursuit . . . seems to most of us unfair and dishonest.' *Falter v. United States*, 23 F.2d 420, 426 (CA2), cert denied, 277 U.S. 590, 48 S.Ct. 528, 72 L Ed 1003 (1928). In such a case, the government has ... deprived the defendant of the 'fair warning,' *Weaver v. Graham*, 450 U.S. 24, 28, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981), that might have led him to preserve exculpatory evidence."

Stogner v. California, 539 U.S. 607, 123 S.Ct at 2449-2550, 156 L.Ed.2d at 551-552.

But the Court also found that section 803(g) "authorized criminal prosecutions that the passage of time had previously barred." *Stogner v. California*, 539 U.S. 607, 123 S.Ct at 2449, 156 L.Ed.2d at 551:

> "Second, the kind of statute at issue falls literally within the categorical descriptions of ex post facto laws set forth by Justice Chase more than 200 years ago in *Calder v. Bull, supra*

--a categorization that this Court has recognized as providing an authoritative account of the scope of the Ex Post Facto Clause."

Justice Chase, the author of *Calder v. Bull*, had described four types of unconstitutional ex post facto laws:

> "'1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. *2d. Every law that aggravates a crime, or makes it greater than it was, when committed.* 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.'" *Calder, supra,* at 390-391, 1 L Ed 648 (emphasis altered from original)."

Justice Chase alternatively described Category 2 laws as inflicting "punishments, where the party was not at law, liable to any punishment." Focusing on Category 2 laws, the Court held:

> "The second category – including any 'law that aggravates a crime, or makes it greater than it was, when committed,' id., at 390, 1 L Ed 648 – describes California's statute as long as those words are understood as Justice Chase understood them--i.e., as referring to a statute that 'inflict[s] punishments, where the party was not, by law, liable to any punishment,' id., at 389, 1 L Ed 648."

Stogner v. California, 539 U.S. 607, 123 S.Ct. 2450-2451, 156 L.Ed.2d 552-553. A statute that "authorizes criminal prosecutions that the passage of time had previously barred" is an unconstitutional

Category 2 statute.

While not deciding whether "extension" statutes are constitutional, the Court recognized that such statutes do not fit into Category 2. They do not revive time barred prosecutions. But by "extension" statutes, the Court meant statutory amendments that merely lengthens the limitation period when the original statute of limitations for a particular defendant has not yet expired.

In *State v. Duffy*, 300 Mont. 381, 390, 6 P.3d 453, 460 (2000), the original statute of limitations was "5 years after the offense was committed." The amendment changed this to "5 years after the victim reaches the age of 18." The Montana Supreme Court held that this simple lengthening of the statute of limitations was not an unconstitutional ex post facto law since the original statute of limitations in defendant's case had not run at the time the Montana Legislature lengthened it. The court relied on *United States v. Morrow*, 177 F.3d 272, 294 (5th Cir. 1999), a similar situation in which Congress had increased the five year bank fraud statute of limitations to ten years. The other cases cited by the Supreme Court as "extension" cases were all very similar to *Duffy* and *Morrow*:

United States v. Madia, 955 F.2d 538 (8th Cir. 1992)	same bank fraud statute and facts as in *Morrow*.
United States v. Richardson, 512 F.2d 105 (3rd. Cir. 1975)	5 years from offense increased to 5 years following registrant's 26th birthday.
United States v. Haug, 21 F.R.D. 22 (ND Ohio 1957)	Communist registration statute of limitations increased from 3 to 5 years
United States v. Kurzenknabe, 136 F.Supp. 17 (DCNJ 1955)	federal false statement statute increased from 3 to 5 years

People v. Shedd, 702 P.2d 267 (Colo. 1985)	After 3 year statute of limitations had expired, increasing statute to 10 years could not revive the prosecution.
State v. Davenport, 536 N.W.2d 686 (N.D. 1995)	Successive increases in statute of limitations were permissible if the previous statute had not yet expired.
People ex rel. Reibman v. *Warden*, 242 A. D. 282, 285, 275 N. Y. S. 59, 62 (App. Div. 1934)	Increase in 2 year limitations period to 5 years.
Commonwealth v. *Rocheleau*, 404 Mass. 129, 130-131, 533 N. E. 2d 1333, 1334 (1989)	Increase in limitations period from 6 to 10 years could not be applied to defendant whose 6 year limitations had expired at time of amendment.
State v. *Nunn*, 244 Kan. 207, 218, 768 P.2d 268, 277-278 (1989)	increase in limitations from 2 to 5 years"
State v. *O'Neill*, 118 Idaho 244, 247, 796 P.2d 121, 124 (1990)	increase from 3 to 5 years.
State v. *Hirsch*, 245 Neb. 31, 39-40, 511 N. W. 2d 69, 76 (1994)	increase from 3 to 5 years.
State v. *Schultzen*, 522 N. W. 2d 833, 835 (Iowa 1994)	increase from 4 years to 6 months after victim's 18th birthday
State v. *Cookman*, 127 Ore. App. 283, 289, 873 P.2d 335, 338 (1994)	increase from 3 to 6 years could not apply to defendant whose 3 years had run at time of enactment.

Commonwealth v. *Guimento,* 341 Pa. Super. 95, 97-98, 491 A. 2d 166, 167-168 (1985)	increase from 3 to 5 years years could not apply to defendant whose 3 years had run at time of enactment.
People v. *Chesebro,* 185 Mich. App. 412, 416, 463 N. W. 2d 134, 135-136 (1990)	increase from 6 years to 6 years or when victim reaches 21, whichever is later.

Indeed, the Learned Hand opinion on which many of these cases rely, *Falter* v. *United States,* 23 F.2d at 426 (2nd Cir.), cert. denied, 277 U.S. 590 (1928), itself involved a typical extension amendment increasing a statute of limitations from three to six years.

Section 803(g) is not this kind of "extension" statute. It does not merely lengthen the time for prosecuting a case while an earlier statute of limitations is still in effect. Section 803(g) is, literally and in effect, a Category 2 statute. The section says that it "applies ***only*** if ... the limitation period specified in Section 800 or 801 ***has expired....***" In addition, Penal Code section 803(g)(3)(A) says that the section "shall ***revive*** any cause of action ***barred*** by [prior statutes of limitations]. *People v. Frazer* (1999) 21 Cal.4th 737, 747.

When section 803(g) was enacted on January 1, 1994, by its specific language, it only applied to prosecutions for which the section 800 six year statute of limitations had expired. These were the cases involving pre-1988 molestation claims, like *Stogner.* And the Court has specifically held that these cases cannot be prosecuted at all.

On January 1, 1994, section 803(g) did not apply to any cases involving post-1987 molest claims, for the six years of section 800 had not expired. Section 803(g) did not apply because it says so. Section 803(g) would not become applicable to such prosecutions until their six year limitation periods had expired. So it does not matter , for

these prosecutions, that section 803(g) first became effective on January 1, 1994. It did not become effective, for those particular prosecutions, until their six year limitation periods had expired. And once that happens, section 803(g) acts to "authorize" a "criminal prosecution that the passage of time had previously barred." It is literally an unconstitutional Category 2 law.

Under the statutory scheme of section 803(g), there must *always* be an interval, between the expiration of section 800's six years and the beginning of section 803(g)'s one year, when prosecution is time-barred. As the Court of Appeals admitted, the section specifically provides that a victim's report to the police ***before*** the six years has run does not count as a qualifying "report" and has no effect on the statute of limitations. *People v. Renderos* (Appendix 1, A-6), citing *Frazer*, 21 Cal.4th at 752. "Section 803, subd. (g)... requires a report to law enforcement by the ***victim to remove the bar of the statute of limitations***, absent which prosecution ***remains time-barred.***" *Ream v. Superior Court* (1996) 48 Cal.App.4th 1812 at 1819.

If the purported victim reports the alleged molestation to the police soon after Penal Code section 800's six years expires, the period in which the prosecution is time barred might not be very long. But the length of time a prosecution may be time-barred makes no difference under *Stogner*. If a prosecution is time-barred, it's time-barred. The state can't resurrect a time-barred prosecution without violating the Ex Post Facto clause.

Moreover, there is no time limit on when a purported victim can trigger the resurrection of a time-barred molestation prosecution. He or she can choose to report the alleged molestation whenever he or she wants, perhaps decades in the future. The only implied time limit for reporting a molestation is the proposed defendant's lifetime. There is no difference between pre-1988 and post-1987 cases here.

Section 803(g) also has an arbitrary effect that would not be present if, for instance, the State of California was simply to eliminate the statute of limitations for child molestation. It gives the power to the purported victim to trigger a prosecution by reporting an alleged molestation. The purported victim can report an alleged molestation at any time, long after he or she has become an adult. Once the alleged victim reports an alleged molestation, however, his or her action triggers a relatively short statute of limitations. The prosecutor can choose not to prosecute, of course, but if the prosecutor does not then act quickly, the one year will run and the prosecutor will then be to blame. Thus, section 803(g) gives a purported victim unusual leverage over the charging discretion of the prosecutor. The act of reporting puts pressure on the prosecutor to charge an old case quickly

The Court of Appeals held that section 803(g) "***can be read*** as 'extending' the statute of limitations.." *People v. Renderos*, (Appendix 1, A-6, emphasis added.) The only supporting authority that the Court of Appeals cited was the irrelevant remark in *Frazer* that 803(g) "serves to ***prolong***, rather than ***shorten***, the time in which a felony child molestation prosecution may be brought." *(People v. Renderos, id*, quoting *Frazer* at p. 752). Moreover, the Court's use of the phrase "can be read" suggests that the Court believed it could deem section 803(g) an "extension" statute as a matter of State law. Whether section 803(g) is an "extension" or "revival" statute is a matter of federal constitutional law, not state law. "Construing" a statute to avoid an unconstitutional application means limiting the statute's effect and operation to matters that it may constitutionally regulate or prohibit. *Welton v. City of Los Angeles* (1976) 18 Cal.3d 497, 505-506, citing *In re Brown* (1973) 9 Cal.3d 612, 623. It does not mean stamping "constitutional" on the statute, as the Court of Appeals has done.

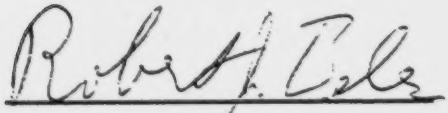
Section 803(g) cannot be an "extension" statute, under *Stogner*, unless

any new statute "prolonging" the time in which the state may bring an action is an "extension" statute. If the Court had intended such a result, it would have would not have engaged in an extended discussion comparing extension and revival statutes.

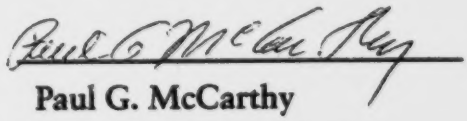
CONCLUSION

For the above reasons, this honorable Court should grant certiorari in this case.

Dated: Oakland, California, Tuesday, July 6, 2004.



Robert J. Beles



Paul G. McCarthy
Attorneys for *Petitioner*

APPENDIX 1
CALIFORNIA COURT OF APPEALS DECISION

THE PEOPLE, *Plaintiff and Respondent*,

v.

VICTOR MANUEL RENDEROS, *Defendant and Appellant*.
In re VICTOR MANUEL RENDEROS, on Habeas Corpus.

A097873, A103588

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

114 Cal. App. 4th 961; 8 Cal. Rptr. 3d 163; 2003 Cal. App. LEXIS 1961; 2004 Cal. Daily Op. Service 21; 2004 Daily Journal DAR 7

December 30, 2003, Filed

*NOTICE: CERTIFIED FOR PARTIAL PUBLICATION**

**This opinion is certified for partial publication only. (Cal. Rules of Court, rules 976(b) and 976.1.) The portions to be published are the three paragraphs of the introduction of the opinion, Part I.A. of the Discussion, and the Disposition.*

SUBSEQUENT HISTORY: Time for Granting or Denying Review Extended People v. Renderos, 2004 Cal. LEXIS 2826 (Cal., Mar. 24, 2004)

Review denied by People v. Renderos, 2004 Cal. LEXIS 3290 (Cal., Apr. 14, 2004)

PRIOR HISTORY: Appeal from the Solano County Superior Court.

Solano County Superior Court, No. VC153448. Trial Judge: Hon. Michael E. Nail.

COUNSEL: Robert J. Beles and Paul McCarthy for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gerald A. Engler, Assistant Attorney General, Catherine A. Rivlin and Gregg E. Zywicke, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: Parrilli, J., McGuiness, P. J., and Corrigan, J., concurred.

OPINIONBY: Parrilli

OPINION: Parrilli, J.--(1) In this case we hold Penal Code section 803, subdivision (g) (section 803(g)), does not violate ex post facto principles when it is used to extend the unexpired time in which criminal charges may be brought for certain offenses involving substantial sexual conduct against minors.

After a jury trial, Victor Manuel Renderos was found guilty of 26 counts of sex offenses against a child under the age of 14 years, as designated in section 803(g). The usual statute of limitations for the offenses was six years under Penal Code, section 800. Before the six-year period expired for each offense, however, section 803(g) was enacted. Section 803(g) permits the filing of a criminal complaint within one year of the victim's report of the offenses so long as the offenses involve defined substantial sexual conduct and there is independent evidence that clearly and convincingly corroborates the allegations. Based upon its true findings the section 803(g) requirements had been met for each offense, the jury determined the People had timely commenced the prosecution.

By a separate motion, Renderos now seeks summary reversal of his convictions, arguing the prosecution was barred by the six-year statute of limitations and any extension under section 803(g) was unconstitutional. In the published portion of the opinion, we conclude the application of section 803(g) to the offenses for which defendant was convicted does not operate as an ex post facto law. In the unpublished portion of the opinion, we conclude there is no merit to Renderos's additional arguments challenging his convictions and sentences; and we summarily deny his petition for a writ of habeas corpus based upon a claim his trial counsel was ineffective.

FACTUAL AND PROCEDURAL BACKGROUND*

[NOT CERTIFIED FOR PUBLICATION]

*See footnote, *ante*, page. 961.

DISCUSSION

I. Timeliness of Prosecution

A. Statutory Extension of Statute of Limitations

Renderos was convicted of felony sex offenses in violation of Penal Code section 288, 288a, 289, and 288.5 [fn4], committed between May 1, 1992 and September 19, 1994. Under section 800, the People were required to commence prosecution within six years of the commission of the offenses. However, before the six-year period in section 800 expired for any of the offenses, the Legislature enacted section 803, subdivision (g) (section 803(g)). (Stats. 1993, ch. 390, § 1, eff. Jan. 1, 1994, amended Stats. 1996, ch. 130, § 1, eff. Jan. 1, 1997, and Stats. 1997, ch. 29, § 1, eff. June 30, 1997.) Section 803(g) currently provides, in relevant part: "(1) Notwithstanding any other limitation of time in [section 800 or 801], a criminal complaint may be filed

within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5. [P] (2) This subdivision applies only if ... [P] (A) The limitation period specified in Section 800 or 801 has expired."

> fn4 All further unspecified statutory references are to the Penal Code.

After Renderos filed his opening brief and the People filed their responsive brief, Renderos moved for summary reversal of the convictions, relying upon the United States Supreme Court's ruling in *Stogner v. California* (2003) 539 U.S. 607 [156 L. Ed. 2d 544, 123 S. Ct. 2446] (*Stogner*). In an order dated July 7, 2003, we deferred ruling on the motion. We now deny the motion for summary reversal.

(2) In *Stogner, supra*, the United States Supreme Court held ex post facto principles barred the application of section 803(g) to those cases where the statute of limitations on the charged offenses had expired before January 1, 1994. (*Stogner, supra,* 539 U.S. ___ [123 S. Ct. at p. 2461].) The court, however, expressly noted its holding did not affect or otherwise "prevent the State from extending time limits ... for prosecutions not yet time barred." (*Id.* at p. __ [123 S. Ct. at p. 2461].) Thus, the only consequence of *Stogner* is that any enumerated crime must be committed or the limitations period in section 800 or 801 must expire after January 1, 1994 (the effective date of the statute) in order for the extended one-year period to apply. Because the limitations period in section 800 for all the offenses charged in this case expired after January 1, 1994, section 803(g) does not violate any constitutional provision against *ex post facto* laws. [fn5] (See, also, *Harris v. Superior Court* (1988) 201 Cal. App. 3d 624, 630, fn. 3 [247 Cal. Rptr. 620]; *People v. Lewis* (1986) 180 Cal. App. 3d 816, 822-823 [225 Cal. Rptr. 782]; *People v. Sample* (1984) 161 Cal. App. 3d 1053

[208 Cal. Rptr. 318], *People v. Eitzen* (1974) 43 Cal. App. 3d 253, 266-267 [117 Cal. Rptr. 772].)

> fn5 Although the 1996 amendment to the statute expressly made section 803(g) retroactive to all offenses committed before, on, or after January 1, 1994 (§ 803(g)(3)(A)), that amendment did not change but merely clarified the effect of the 1994 law. (*People v. Frazer* (1999) 21 Cal.4th 737, 753 [88 Cal. Rptr. 2d 312, 982 P.2d 180], abrogated on other grounds in *Stogner, supra,* 539 U.S. at p.__ [123 S. Ct. at p. 2453].)

Renderos acknowledges "the Legislature could probably have enacted an extension of the statute of limitations in section 800 in 1994 that would have survived a challenge as an ex post facto law." He contends, however, section 803(g), by its express terms, cannot be read as merely "extending" or "tolling" the statute of limitations for crimes committed before January 1, 1994, where the limitations period under section 800 or 801 had not expired. He premises his argument upon two factors: (1) the proviso in subsection (2) of section 803(g) that subdivision (g) applies only if "the limitation period specified in Section 800 or 801 has expired;" and (2) because there must always be an interim period in which the prosecution is time-barred (between the expiration of the statute of limitations in section 800 or 801 and the filing of a report by the victim), section 803(g) cannot be interpreted as a "toll" or "extension" of the six-year statute of limitations. Thus, he argues section 803(g) can only be read as "reviving" time-barred actions, which is prohibited by the ruling in *Stogner*. We conclude the statute can be read to withstand Renderos's ex post facto challenge. [fn6]

> fn6 Renderos does not challenge the application of section 803(g) on the ground the law should not be given retroactive effect, an argument recently rejected by the Fifth District in *People v. Robertson* (2003) 113 Cal.App.4th 389 [6 Cal. Rptr.

3d 363].

Subdivision (g) of section 803, provides: "*Notwithstanding any limitation*" in section 800 or 801, the People may pursue a prosecution of certain sexual offenses involving minors within one year from the time a victim files a report. The proviso that the subsection does not apply unless the statute of limitations has expired in section 800 or 801 "obviously ensures that the one-year period in section 803(g)(1) does not override or otherwise conflict with sections 800 or 801 where the victim reports the crime to a qualifying law enforcement agency before the three-year or six-year period set forth in the latter provisions 'has expired.' In this way, the limitations period in section 803(g)--like other 'tolling' and 'extension' provisions in the same statute--serves to prolong, rather than shorten, the time in which a felony child molestation prosecution may be commenced." (*People v. Frazer, supra,* 21 Cal.4th at p. 752.)

(3) Thus, for those offenses committed before January 1, 1994, but where the statute of limitations in section 800 or 801 had not yet expired as of that date, section 803(g) can be read as "extending" the statute of limitations so that a prosecution is timely if it is commenced no more than one year after a victim reports the abuse to an appropriate law enforcement agency. That the People could not prosecute the action until a report was filed by Ryan (*Ream v. Superior Court* (1996) 48 Cal.App.4th 1812, 1819 [56 Cal. Rptr. 2d 550]), does not support Renderos's contention the statute as applied to him had the effect of "reviving" a prosecution barred by the statute of limitations. Because the statute of limitations under section 800 had not expired when section 803(g) became effective on January 1, 1994, section 803(g) permitted the People to commence prosecution for the offenses within one year after the filing of Ryan's report of abuse, notwithstanding the limitation period in section 800.

B.-C.*

[NOT CERTIFIED FOR PUBLICATION]

'*See footnote, *ante*, page 961.

'II.-IX.*

[NOT CERTIFIED FOR PUBLICATION]

'*See footnote, *ante*, page 961.

DISPOSITION

The motion for summary reversal is denied, the judgment is affirmed, and the petition for a writ of habeas corpus is summarily denied. McGuiness, P. J., and Corrigan, J., concurred.

APPENDIX 2

CALIFORNIA SUPREME COURT DECISION

Court of Appeal, First Appellate District, Division Three - Nos. A097873/A103588

S122464

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

VICTOR MANUEL RENDEROS, Defendant and Appellant.

In re VICTOR MANUEL RENDEROS ON HABEAS CORPUS.

Petition for review DENIED.

SUPREME COURT
FILED
APR 1 4 2004
Frederick K. Ohlrich Clerk
DEPUTY

GEORGE, R

Chief Justice